

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GUSTAVO BADELL,

2:10-CV-250 JCM (PAL)

Plaintiff,

V.

ADVANCED ANABOLIC SCIENCES,
LLC, et al.,

Defendants.

ORDER

15 Presently before the court is plaintiff Gustavo Badell's motion to remand. (Doc. # 10).
16 Defendant Advanced Anabolic Sciences, LLC filed an opposition (doc. # 13), and plaintiff Badell
17 filed a reply. (Doc. # 15).

18 Also before the court is defendant Advanced Anabolic Sciences, LLC's (hereinafter
19 "Advanced Anabolic") motion to dismiss. (Doc. # 14). Plaintiff Badell filed an opposition (doc.
20 # 16), and defendant filed a reply. (Doc. #17).

21 Plaintiff filed his complaint in the Eighth Judicial District Court in January 2010 with the
22 following claims for relief: 1) injunctive relief; 2) right of publicity; 3) invasion of
23 privacy/misappropriation of image; 4) negligence; 5) unjust enrichment; 6) equitable
24 lien/constructive trust. (Doc. #1). Plaintiff's complaint stems from the alleged use of his photograph
25 in defendant's sales publication without his knowledge, consent, or compensation. On February 22,
26 2010, defendant Advanced Anabolic removed the case to this court on the basis of diversity.

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1 Federal district courts have "original jurisdiction" where there is diversity of citizenship
2 between the parties, and the amount in controversy, exclusive of interest and costs, exceeds \$75,000.
3 28 U.S.C. § 1332(a). In his motion to remand, plaintiff argues that removal to this court is improper
4 because the amount in controversy does not exceed \$75,000.

5 Where a plaintiff has not alleged a specific amount in controversy, the defendant claiming
6 removal jurisdiction bears the burden of establishing a sufficient amount in controversy by a
7 preponderance of the evidence. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th
8 Cir.1996); *McCaa v. Mass. Mut. Life ins. Co.*, 330 F.Supp.2d 1143, 1145 (D.Nev.2004). A
9 defendant may use the amount a plaintiff attached to his claim in a settlement demand letter as
10 evidence that the amount in controversy exceeds the minimum for diversity jurisdiction. *Conn v.*
11 *Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir.2002). Additionally, punitive damages may be considered
12 as part of the amount in controversy. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001).

13 Here, plaintiff has not specifically pleaded damages, and in accordance with Nevada law, has
14 stated in his complaint a prayer for relief "in excess of \$10,000" for each of the following: damages,
15 disgorgement of profits, and punitive damages. Therefore, defendant must show that the amount in
16 controversy more likely than not exceeds \$75,000.

17 As evidence in favor of removal, defendant offers plaintiff's demand letter requesting
18 damages in excess of five million dollars. However, the amount included in this letter does not
19 provide any formula or calculation method in support of the demand. Without providing
20 approximate dates or context, defendant also points to conversations where plaintiff's counsel has
21 represented that the present case is worth at minimum \$100,000. Plaintiff responds that the amount
22 listed in the demand letter was mere puffery, and that plaintiff's counsel has no recollection of the
23 statements made to defense counsel.

24 This court finds that defendant has not established by a preponderance of evidence that the
25 amount in controversy is sufficient for the purpose of diversity jurisdiction. This court finds that
26 defendant has made only conclusory allegations without providing specific evidence as to the value
27 and nature of plaintiff's claims.

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1 Having determined that removal jurisdiction is improper, this court will not address the
2 merits of the defendant's motion to dismiss.

3 Accordingly,

4 IT IS HEREBY ORDERED ADJUDGED AND DECREED that plaintiff's motion to remand
5 (Doc. # 10) is GRANTED.

6 IT IS FURTHER ORDERED that defendant's motion to dismiss (doc. # 14) is DENIED
7 without prejudice.

8 DATED June 23, 2010.

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10 **UNITED STATES DISTRICT JUDGE**
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